

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION**

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RUBEN GUTIERREZ,	:	
	:	
Petitioner,	:	
	:	CIVIL ACTION NO. 1:09-CV-22
v.	:	
	:	<b>DEATH PENALTY CASE</b>
LORIE DAVIS,	:	
Director, Texas Department of Criminal Justice,	:	
Correctional Institutions Division	:	
	:	
Respondent.	:	
	:	

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**EXECUTION SCHEDULED FOR OCTOBER 30, 2019**

**STATUS REPORT**

Mr. Gutierrez hereby provides this report so that the Court is aware of the current status of litigation in his case.

Mr. Gutierrez was convicted of capital murder in 1999, in the 107th Judicial District Court of Cameron County, Texas, and sentenced to death. In 2002, a divided Court of Criminal Appeals (“CCA”) affirmed the conviction and sentence. *Gutierrez v. State*, No. 73,462 (Tex. Crim. App. Jan. 16, 2002). Mr. Gutierrez’s direct appeal counsel did not seek certiorari.

Mr. Gutierrez sought state habeas relief in the Texas courts. After the state habeas trial court initially denied relief, the CCA denied all but two claims for relief and remanded the case to the trial court to supplement the record with affidavits from trial and appellate counsel. *Ex parte Gutierrez*, No. 59,552-01, 2004 WL 7330936 (Tex. Crim. App. Sept. 15, 2004). Following the remand and supplementation, the CCA denied the remaining claims. *Ex parte Gutierrez*, No. 59,552-01, 2008 WL 2059277 (Tex. Crim. App. May 14, 2008).

Mr. Gutierrez sought appointment of counsel and, on January 26, 2009, filed a petition for a writ of habeas corpus in this Court. See Doc. 1. Mr. Gutierrez was represented by attorney Margaret Schmucker. Mr. Gutierrez then sought, and the Court granted, a stay and abeyance so that Mr. Gutierrez could file a successive state writ to exhaust additional claims. See Doc. 10.

Upon returning to state court, Mr. Gutierrez sought the appointment of counsel and DNA testing pursuant to Texas Code of Criminal Procedure Chapter 64. The State opposed. The trial court initially denied only the motion for appointment of counsel and Mr. Gutierrez appealed. The CCA dismissed the appeal for lack of jurisdiction because the denial of counsel was found not to be an immediately appealable order. *Gutierrez v. State*, 307 S.W.2d 318 (Tex. Crim. App. 2010). The trial court subsequently denied the motion for DNA testing under Chapter 64 and Mr. Gutierrez appealed the denial of counsel and post-conviction DNA testing. The CCA affirmed, finding that Mr. Gutierrez was not entitled to the appointment of counsel or to post-conviction DNA testing under Chapter 64. *Ex Parte Gutierrez*, 337 S.W.3d 883 (Tex. Crim. App. 2011). After the case returned to federal court, this Court granted the State's Motion for Summary Judgment and dismissed the petition. Doc. 44. On November 13, 2014, the Fifth Circuit denied Mr. Gutierrez's request for a certificate of appealability. *Gutierrez v. Stephens*, 590 F. App'x 371 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 35 (2015).

On November 4, 2015, Mr. Gutierrez then filed a Motion for Miscellaneous Relief in the state trial court seeking independent DNA testing of potentially exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963). On April 11, 2018, the trial court signed the State's Proposed Order denying the Motion. On April 13, 2018, the trial court signed Mr. Gutierrez's Warrant of Execution, setting his execution date as September 12, 2018.

After Mr. Gutierrez's previous attorney was removed from the Fifth Circuit's CJA appointment panel and moved to be relieved as counsel in this case (Doc. 56), this Court appointed undersigned counsel to represent Petitioner. Doc. 63 and 71.

On August 15, 2018, Petitioner filed a motion to stay his execution with this Court. On August 22, 2018, the Court granted the motion and stayed Mr. Gutierrez's execution. Doc. 79. The Director appealed this Court's decision to the Court of Appeals. On September 10, the Court of Appeals denied the Director's motion to vacate the stay of execution. Doc. 91. Respondents did not seek certiorari.

On April 30, 2019, the Cameron County District Attorney's office filed a motion to set a new execution. That motion was signed the following day by Judge Euresti, and Mr. Gutierrez's execution was scheduled for July 31, 2019. On June 8, 2019, Mr. Gutierrez filed an "Agreed-Upon Motion to Recall Order Setting Execution Date and Warrant of Execution" due to defects in the warrant. That motion was granted on June 21, 2019, and on that same date, the court set a new execution date for Mr. Gutierrez, currently scheduled for October 30, 2019.

In the meantime, Mr. Gutierrez filed a renewed motion for DNA testing in state court on June 14, 2019. This motion was originally granted by the trial court but that order was later reversed on June 27, 2019, and the motion was denied. Petitioner filed a notice of appeal and expects to file his brief in the CCA within the next two weeks. Mr. Gutierrez has fought for nearly a decade to have the forensic evidence in his case DNA tested, including fingernail scrapings, blood stains, and hair evidence. To date, none of it has been tested. Undersigned counsel will keep this Court apprised of the status of this litigation.

Respectfully Submitted,

/s/ Shawn Nolan

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Dated: August 29, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I served the foregoing pleading and the attachments thereto on the following person by ECF filing:

Jefferson David Clendenin  
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/s/ Shawn Nolan

Shawn Nolan

Dated: August 29, 2019